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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

**MINNESOTA MINING AND MANUFACTURING
COMPANY,**

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 621

**MINNESOTA MINING AND MANUFACTURING
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vs.

Appellant,

WISCONSIN DEPARTMENT OF TAXATION.

Appellee.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the above-named appellant files this, its separate statement particularly disclosing the basis on which it is contended the Supreme Court has jurisdiction upon the appeal to review the judgment appealed from herein.

The appellant, in support of the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully represents:

**(a) Basis On Which It Is Contended That United States
Supreme Court Has Jurisdiction.**

The case is one in which the validity of a statute of the State of Wisconsin as applied in assessing certain taxes against the appellant, was drawn in question, upon the

ground that the statute as applied is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The final decision in the Supreme Court of the State of Wisconsin, the Court of last resort in that State, is in favor of the validity of the statute as applied. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, Par. 2) the case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stats. L. 541) was passed, to-wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

(b) The Statutory Provisions Sustaining Jurisdiction.

The statute supporting jurisdiction in this case is Section 237 (a) of the Federal Judicial Code (28 U. S. C. A. Section 344 (a)) which provides:

“A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.*” (Italics ours.)

Petitioner also relies on Rule 46 of the Rules of the United States Supreme Court and particularly on Paragraph 2 thereof which provides in part:

“Under the act of January 31, 1928, as amended by the act of April 26, 1928, the review which theretofore could be had in this Court on writ of error may now be obtained on an appeal. . . .”

(c) The Statutes and Laws of the State of Wisconsin, the Validity of Which Is Involved.

The statutes and laws of the State of Wisconsin as construed and applied in this case, which are involved, are as follows: Section 3, Chapter 505, Laws of Wisconsin, 1935, effective on its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin, 1935, effective on its publication on October 8, 1935, provide:

“Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within in the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary such dividends shall be

presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted, and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

The above legislation was extended in operation by Chapter 309 of the Session Laws of Wisconsin of 1937 to July 1st,

1939, and by Chapter 198 of the Session Laws of 1939 to July 1st, 1941, further by Chapter 198 of the Session Laws of 1939, the rate was increased from two and one-half per cent ($2\frac{1}{2}\%$) to three per cent (3%). Chapter 223, Session Laws of 1937, also slightly amended the law, but such amendment has no bearing on the controversy here involved.

(d) Date of Judgment To Be Reviewed and Date of Application For Appeal.

The date of the judgment and decision of the Supreme Court of Wisconsin sought to be reviewed is June 16, 1943, as modified and supplemented by decision and judgment denying petition for rehearing by the Wisconsin Supreme Court on September 14, 1943. The date upon which the application for appeal to United States Supreme Court is presented is December 11th, 1943.

(e) Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon.

The case involves the validity of certain assessments made against the appellant, Minnesota Mining & Manufacturing Company, a Delaware corporation, for so-called Wisconsin privilege dividend taxes pursuant to Section 3 of Chapter 505 of the Laws of 1935 as amended and as extended by Chapter 309, Session Laws of 1937, and Chapter 198, Session Laws of 1939.

The controversy at issue arose out of three separate assessments of so-called Wisconsin privilege dividend taxes under the laws above set forth.

In substance this law attempts to impose a tax of two and one-half per cent ($2\frac{1}{2}\%$) (three per cent (3%) after July 1, 1939) on the amount of dividends declared and paid

by corporations, domestic and foreign, out of income derived from property located and business transacted in the state of Wisconsin. The law specifically provides that such tax shall be deducted and withheld from such dividends payable to resident and nonresident stockholders by the payor corporation. The corporation declaring the dividend is also made liable for the tax, but is required to deduct it from the dividends payable to the stockholders.

The basic facts in connection with the assessments are not in dispute. The appellant is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. Its only operations in Wisconsin is in connection with a factory at Wausau, Wisconsin, where it manufactures roofing granules. It commenced actual operations in Wisconsin in 1930 and was duly qualified as a foreign corporation. Sales are made of the products from the Wisconsin operations through a sales office in Chicago, Illinois. All of these orders are confirmed at the St. Paul office and shipping instructions forwarded from the St. Paul office (R. 186). When products so manufactured are sold, the remittances are made directly to the home office at St. Paul and funds from such sales are deposited in the bank account of the appellant. Pay rolls are prepared in St. Paul and are drawn on a Wausau, Wisconsin, bank and a deposit equalling the amount of the pay roll is forwarded to the Wausau, Wisconsin, bank from St. Paul to cover the checks approximately at the time the checks representing the pay roll are forwarded (R. 187). The appellant, as a foreign corporation, reports such income as is taxable to the state of Wisconsin for income tax purposes on a calendar year basis (R. 128). All dividends upon which the attempt to tax involved in this controversy were levied were declared by the board of directors of the company at meetings held at St. Paul, Minnesota. The transfer agent for shares of stock is the First Trust Com-

pany of St. Paul, Minnesota (R. 108, 186). Dividends paid by the appellant during the whole period involved in controversy on this appeal were paid to the transfer agent in St. Paul by check drawn on the St. Paul bank, and distributed by such bank through the mails to company stockholders by the transfer agent; no stockholders' meetings or directors' meetings have ever been held in the state of Wisconsin (R. 186). Only a small percentage of the outstanding stock of the appellant is owned by Wisconsin residents. The records show that dividends are not paid out of the earnings of the company for the year immediately preceding the payment of the dividend, but are rather paid out of the general funds of the corporation. The dividends in question were paid pursuant to Section 34 of the Delaware Corporation Law, which provides as follows:

"The directors of every corporation created under this Chapter, subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Section 14, 26, 27 and 28 of this Chapter, or (b), in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year" (R. 193).

The dividends in question were paid out of the surplus of the company (R. 188).

Many stockholders in the company have only a small number of shares of stock and on the basis of the assessments as made a tax cannot be computed and withheld from the small stockholders in the exact amount thereof because the amount of tax would be a fractional amount of a cent (R. 113, 119). In making the assessments in question the Wisconsin Department of Taxation attempted to analyze the total surplus of the corporation on December 31st of the

year preceding the year in which a particular dividend was paid, to ascertain how much Wisconsin income was in the surplus. In such alleged analysis, the Department analyzed surplus back to the date on which the corporation first commenced doing business in Wisconsin attempting to determine the total surplus at that time and then attempting to analyze from year to year the ratable contributions of earnings in Wisconsin to the surplus as of December 31st prior to the declaration of the dividend. It then determined the percentage of Wisconsin earnings in surplus to aggregate surplus and applied a fraction resulting from this ratio to total dividends paid by the corporation and taxed that portion of the dividend so allocated to Wisconsin. The stock records of the company are maintained in Minnesota and Delaware and not in Wisconsin. The surplus of the company at the end of various years was invested in accounts, inventory, fixed assets, such as lands, buildings, machinery and equipment located in various states, and in cash (R. 121-123).

The Wisconsin Department of Taxation purporting to act under the Wisconsin privilege dividend tax law levied three separate additional assessments against the appellant as follows:

Dividends paid in the calendar year of 1936	\$2,220.60
Dividends paid in the calendar year of 1937	\$3,037.75
Dividends paid in the calendar years of 1938, 1939, and 1940	\$9,307.08

Appropriate claims for abatement were filed with the Department of Taxation and denied. Thereafter, as provided by the laws of Wisconsin, the appellant petitioned the Wisconsin Board of Tax Appeals for review of assessments and reversal thereof. The matters were consolidated for hearing and a single record made up before the Board of Tax Appeals which affirmed the assessments so

made, with modification of certain assessments not material to the controversy in its present stage.

The appellant then appealed said determination of the Board of Tax Appeals to the Circuit Court for Dane County, Wisconsin, and that court affirmed the decision and order of the Board of Tax Appeals.

The appellant appealed from this decision and judgment of the Circuit Court for Dane County to the Supreme Court for the State of Wisconsin, the court of last resort in Wisconsin, and it affirmed the judgment so delivered. On the issue of whether a portion of the law was unconstitutional under the Fourteenth Amendment of the Constitution of the United States as being vulnerably retroactive and as such taking the property of the appellant and its stockholders without due process of law, the Supreme Court of the State of Wisconsin was evenly divided—three justices being of the opinion that the law was unconstitutional to the extent that it imposed a vulnerably retroactive tax, the other three justices being of the opinion that the law was constitutional in this respect.

Throughout all of these proceedings, the appellant has challenged the validity of the law as applied to dividends paid by it and particularly has it challenged the law and the tax assessments thereunder as applied to dividends paid by it on the ground that it takes its property and the property of the stockholders of the appellant without due process of law and in contravention to the Fourteenth Amendment of the United States because it imposes a tax beyond the taxing jurisdiction of the state of Wisconsin.

Appellant also throughout the proceedings has further challenged the validity of the law as applied to it and its stockholders so far as it purports to reach the alleged Wisconsin income purportedly included in the payment of the dividend *regardless of when earned*, it being contended that in any event to the extent that the law and the purported

tax attempts to reach so-called Wisconsin income in surplus for many years prior to the enactment of the law in 1935, that such law and tax takes the property of the appellant and its stockholders without due process of law and in contravention of the Fourteenth Amendment of the United States.

The Wisconsin Supreme Court in its decision in the instant case specifically ruled upon the constitutional questions so raised by the appellant, but denied it the relief prayed for although as hereinbefore pointed out on the constitutional retroactivity phase of the matter, the Wisconsin Supreme Court was evenly divided. In its decision on motion for rehearing the Wisconsin Supreme Court unqualifiably ruled that the difference of conclusion on the retroactivity phase of the matter raised by the two divisions of the Court was based upon both the United States Constitution and the Constitution of the State of Wisconsin.

It should be noted at this point that certain phases of the Wisconsin privilege dividend tax law have heretofore been before this Court in the cases of *State of Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246; *State of Wisconsin v. Minnesota Mining & Manufacturing Co.*, 311 U. S. 452, 61 Sup. Ct. 253; and *State of Wisconsin v. F. W. Woolworth Co.*, 311 U. S. 622, 61 Sup. Ct. 395.

Those cases involved a review of a determination of the Supreme Court of the State of Wisconsin which found the Wisconsin privilege dividend tax law as applied to foreign corporations unconstitutional under the Fourteenth Amendment of the Constitution of the United States. This Court by a five (5) to four (4) decision—Chief Justice Hughes, Mr. Justice McReynolds, Mr. Justice Roberts and Mr. Justice Reed, dissenting—reversed the Wisconsin Supreme Court, the majority of the Court speaking through Mr. Justice Frankfurter, holding that the practical operation of the law and tax was to impose an additional income

tax on corporate income when paid out, and holding that the fact that the Wisconsin Supreme Court had "labeled" the law a tax on the privilege of declaring dividends rather than as a supplementary income tax on the corporation did not vitiate the tax, and that Wisconsin had the power to levy such a supplementary income tax on the corporation because it had given protection to the earning of the income (*State of Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 at 444). The dissenting division of the Court, however, challenged the construction of the law given in the majority opinion and insisted that the tax was strictly an excise tax and that the tax was a tax against stockholders and as such was clearly invalid under the Fourteenth Amendment to the Constitution of the United States as to a foreign corporation. It is apparent from a reading of the decision, that the majority opinion assumed that if the tax was a tax against the stockholder it could not be sustained.

The taxes involved in the litigation heretofore before this Court had been assessed against the corporations, by the application of a statutory presumption that dividends of a foreign corporation were presumed to have been paid out of earnings of the company attributable to Wisconsin under the general income tax statute for the year immediately preceding the declaration of the dividend in the absence of proof to the contrary. (See Section 4 of Section 3, Chapter 505, Laws of 1935.) This Court in the *J. C. Penney Company* case, *Minnesota Mining and Manufacturing Company* case, and *F. W. Woolworth Company* case remanded the cases to the Supreme Court of Wisconsin for the determination of such questions as were open in light of the opinion so rendered by this Court (*State of Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 446).

The Wisconsin Supreme Court on remand (*J. C. Penney Co. v. Tax Commission* and companion cases, 238 Wis. 69) held and determined that the statutory presumption on which the taxes were assessed in those cases had been

erroneously applied because all of the litigants had paid the dividends out of surplus and this circumstance rebutted the statutory presumption that the dividends were paid out of prior years' earnings. The Wisconsin Supreme Court accordingly remanded the litigation to the Tax Commissioner for further computation of the tax.

On remand the Wisconsin Supreme Court vehemently denied that the tax was an income tax on the corporation as indicated by the majority decision of this Court in the *Penney* case and postulated that if it was an income tax, it was an income tax on the stockholder and as to a non-resident stockholder, void under the Wisconsin constitution.

The tax against the Minnesota Mining & Manufacturing Company involved in the prior litigation involved only a tax on the dividends paid by that company in the calendar year of 1936, and the tax for that year has now been computed on an entirely different basis (so-called surplus analysis basis, instead of statutory presumption basis as originally).

Because on remand, the Wisconsin Supreme Court reversed its decision with directions to remand each case to the Tax Commissioner because of incorrect computation, the taxpayer litigants there involved, inasmuch as such determination was not *final*, had no right or opportunity to appeal from the decision of the Court on remand to this Court to urge that Mr. Justice Frankfurter's construction of the law was clearly erroneous, and inasmuch as the decision on the Federal Constitutional question was predicated solely on a construction of the law as a supplementary corporate income tax, that a different result should be reached.

It is clear, however, that on the decision on remand, the Supreme Court of Wisconsin by its construction of the law removed the basis on which the United States Supreme Court upheld the law and tax in the *Penney* case, by denying a construction to the law which made it an income tax against the corporation.

In short, a basic conflict in the construction of the law existed between that given it by the majority of this Court speaking through Mr. Justice Frankfurter, and that given it in the dissenting opinion of this Court, and by the Wisconsin Supreme Court on remand.

A comparison of the language in the majority opinion of this Court and of the dissenting opinion of this Court and of the language of Mr. Chief Justice Rosenberg on remand illustrates clearly and graphically this basic conflict of construction.

Frankfurter's Opinion.

(61 S. Ct. 248) —

"The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends."

(P. 249) —

"* * * but the privilege dividend tax of 1935 superimposed upon this income tax a tax upon corporate income that is paid out."

"The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because the Supreme Court has described the practical result of the exertion of that power by one formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax."

Roberts' Dissent.

(61 S. Ct. 251) —

"It is said that the challenged exaction is merely an additional income tax—this notwithstanding that the tax is not called an income tax, has been held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege."
* * *

(P. 252) —

"By the very terms of the Act the tax is laid not on the corporation, but on the stockholders receiving the dividend, and, by confession, thousands of stockholders are not residents of Wisconsin."

(P. 252) —

"We are now told that this is not a fair exposition of the law, but that on the contrary and in the teeth of the known facts what Wisconsin did was to lay a supplementary income tax upon foreign corporations."

Chief Justice Rosenberg's Opinion.

(238 Wis. 69 at 73) —

"In no sense and to no extent whatever is it a tax upon the income of the corporation."

(238 Wis. 69 at 73) —

"There is no provision in the Wisconsin statute for taxing disbursements as income. The income of the corporation was taxed by the state when it was received. If the State sought to tax the corporate income at a higher rate, all that it was required to do was to increase the rate."

(238 Wis. 69 at 72) —

"If there has been a shifting of labels in this case, it was not done by this court. It is perfectly true that the tax cannot be sustained as an income tax."

The Supreme Court of the State of Wisconsin in a later series of decisions which will be referred to in a later portion of this statement has by its construction of the law now specifically determined the tax as a tax on the stockholder and not on the corporation, and has thus definitely removed the basis upon which this Court sustained the constitutionality of the law in the *Penney* case.

So, also, have the Federal Courts been placed in an "immaculate dilemma" as a result of this conflict in construction in matters involving the right of a corporation to deduct dividend taxes paid by them from gross income for the purpose of determining net income for Federal income tax purposes. There is a conflict in the decisions in the Federal Courts as a result. These decisions will be referred to on the question of the existence of a substantial federal question. The basis upon which this Court sustained Wisconsin's jurisdiction to tax having now been wholly removed, there is no longer any foundation for the result reached in its decision in the case of *State of Wisconsin v. J. C. Penney Co.* (311 U. S. 435, 61 Sup. Ct. 246) and *State of Wisconsin v. Minnesota Mining & Manufacturing Company* (311 U. S. 462, 61 Sup. Ct. 253).

(f) Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

As hereinbefore stated, there are two major federal constitutional questions raised by the assignments of error and both present *substantial* federal questions:

First, whether the law as now finally construed by the Wisconsin Supreme Court imposes a tax upon transactions and events and on subjects outside of Wisconsin's jurisdiction to tax, and as such deprives the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law and in contravention to

the Fourteenth Amendment of the Constitution of the United States.

Secondly, whether the law as now construed and applied by the Wisconsin Supreme Court is vulnerably retroactive and as such deprives the Minnesota Mining & Manufacturing Company and its stockholders of property without due process of law to the extent of the application of the vulnerably retroactive phase of the law.

(a) *A substantial federal question is involved as to Wisconsin's jurisdiction to tax, in view of the construction of the law now given by the Wisconsin Supreme Court.*

There can be little question but what in view of the construction of the law now given by the Supreme Court of the State of Wisconsin, that a substantial federal question is presented as to the right of Wisconsin to levy a tax on the transactions of a foreign corporation declaring and paying a dividend outside of the State of Wisconsin. The decisions in the cases of *State of Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246, and *State of Wisconsin v. Minnesota Mining & Manufacturing Co.*, 311 U. S. 452, 61 Sup. Ct. 253, in no way negative the existence of a substantial federal question in the instant case. This Court, as has heretofore been pointed out in a five (5) to four (4) decision, sustained the constitutionality of the law solely on a construction that the law was a supplementary income tax on the corporation. In those cases, this Court by majority decision held that the law, *as so construed*, did not violate the Fourteenth Amendment to the Constitution of the United States.

The dissenting opinion by Mr. Justice Roberts, in which three other justices concurred, was based on the conclusion that the tax was not a supplementary corporate income tax against the corporation but rather a transaction tax

on the stockholder and as such obviously invalid. The majority opinion made no attempt whatsoever to sustain the law and tax involved as a tax against a stockholder.

The majority opinion in the *Penney* case held that the descriptive "pigeon-hole" into which the state court puts a tax is of no moment in determining the constitutional significance of the exaction. If justification for the construction given the law in the majority opinion in the *Penney* case can be found, it is solely on the ground that the Wisconsin Supreme Court at that time had not determined the incidence of the tax, merely holding that the tax as a transaction tax, was unconstitutional. This Court further held in the *Penney* case that it was not bound by the *characterization* which a state court gives to a tax. However, the Wisconsin Supreme Court has now construed the privilege dividend tax act and has unequivocally determined that the incidence of the tax is upon the stockholder and not on the corporation. *This is a question not of characterization but of construction.* Mr. Justice Roberts' dissenting opinion was directed entirely to the unconstitutionality of the law and tax as a tax upon a stockholder, and Mr. Justice Frankfurter's majority opinion did not dispute this proposition, but held that it was constitutional as a supplementary income tax upon the corporation, which construction is no longer possible in view of the more recent decisions of the Supreme Court of the State of Wisconsin *construing* the law.

The Circuit Court for Dane County, Wisconsin, Honorable Alvin C. Reis, Circuit Judge presiding, in the instant case has succinctly and forcefully and accurately analyzed the basic conflict herein in the case of *International Harvester Co. v. Wisconsin Department of Taxation*, a companion case. The opinion in that case was adopted by way of reference by the trial court to apply in the instant case

and a copy is attached to this statement. Judge Reis there said:

"We agree with counsel for the International Harvester Company that an immaculate dilemma has been created.

In the first Penney case the Supreme Court held the tax to be a transaction tax or tax on "privilege", as in terms it so states; and since the transaction happened and the privilege was exercised outside of Wisconsin, in the case of a foreign corporation such as this one; the Wisconsin court held the tax unconstitutional, being violative of due process.

When however this case reached the Supreme Court of the United States, that tribunal regarded this tax as a "supplementary income tax" upon the corporation and hence clearly within the power of the state to impose and not infringing upon the fourteenth amendment.

In the third and final round of the battle thus far, i. e., remand from the United States Supreme Court to the Wisconsin court, our local court followed the United States Supreme Court upon the issue of constitutionality *because it had to do so*. That pithes a delicate point rather abruptly but no one will question the accuracy of our assertion.

The Supreme Court of Wisconsin however, in this last decision, refused to recede from its former position that this was an excise or privilege tax. It militantly maintained that it was its right, and its alone, to say what this tax was; and that such was not the province of the Supreme Court of the United States. And thereupon and in the face of the highest federal court declaration that the tax here involved was a "supplementary income tax" upon the corporation, the Wisconsin court unequivocally declared: "*In no sense and to no extent whatever, is it a tax upon the income of the corporation.*" (Our italics.)

J. C. Penney Company vs. Tax Commission, 238 Wis. 69, 73.

We can not settle this dispute. That rests far beyond our hands.

The Wisconsin court insists that the tax is a transaction tax, which under the Federal constitution makes it unconstitutional because based on out-of-state transactions. But the United States court majority opinion disregards it as a transaction tax and sets the tax up as an additional corporate income tax, the validity of which is obvious.

The Supreme Court of Wisconsin, as noted, however, will not accept it as an income tax on the corporation. Furthermore, it postulates that if it is an income tax on individuals, it is unconstitutional *under the state constitution*, because the individuals are beyond the jurisdiction of Wisconsin to tax.

"It is perfectly true that the tax cannot be sustained as an income tax under the law of this state."—Thus spoke our own Supreme Court.

J. C. Penney Company vs. Tax Commission. 238 Wis. 69, 72.

Therefore, as an income levy, the tax is completely *persona non grata* in this state,—an unwanted black sheep in the Wisconsin court's backyard.

Here then is the deadlock: If the tax is a transaction tax, as Wisconsin's court says it is, then it is void under the *Federal* constitution; and the federal court should so hold it. If on the other hand it is an income tax, it can be an income tax only on individuals, according to the Wisconsin court, and then it becomes void under the state constitution; and the state court should so hold it."

This accurate observation of the trial court is emphasized by a series of subsequent decisions both in the Supreme Court of Wisconsin and in the Federal Courts. The Supreme Court of Wisconsin in the case of *Wisconsin Gas & Electric Company v. Department of Taxation*, 243 Wis. 216, 10 N.W. (2d) 140, decided June 16, 1943, held that for Wisconsin income tax purposes a corpora-

tion could not deduct from gross income the privilege dividend tax paid by the corporation for the purpose of determining net taxable income under the Wisconsin income tax law, because the tax was held to be a tax upon the stockholder and not upon the corporation.

The Supreme Court of the State of Wisconsin further in the case of *Blued v. Wisconsin Foundry & Machine Company*, 243 Wis. 221, 10 N. W. (2d) 142, decided June 16, 1943, denied a preferred stockholder the right to collect the amount of tax deducted by the corporation. The preferred stockholder had contended that the law so construed by the United States Supreme Court in the *Penney* case imposed a tax upon corporate earnings and not upon the stockholder, but the Wisconsin Supreme Court held the tax to be on the stockholder and properly so deductible.

This basic conflict in construction given the law by the United States Supreme Court in the *Penney* case and that given it by the Supreme Court of the State of Wisconsin herein referred to, is further emphasized by two recent conflicting decisions in the Federal Courts, where the issue arose as to the right of a corporation to deduct the Wisconsin privilege dividend tax from gross income of the corporation under the Federal income tax law.

Judge Duffy of the Eastern District of Wisconsin in the case of *Wisconsin Gas & Electric Company v. United States of America*, 46 F. Supp. 929, held that because this Court had held in the *Penney* case that the tax was a supplementary corporate income tax, the tax was accordingly a tax on the corporation and properly deductible. Judge Duffy's decision was appealed to the Circuit Court of Appeals for the Seventh Circuit and on November 8, 1943, that Court reversed Judge Duffy's decision. *Wisconsin Gas & Electric Company v. United States of America*; — Fed. — (not yet officially reported). The reversal was based on the fact that since the decision by this Court in

the *Penney* case the Wisconsin Supreme Court has unqualifiedly construed the law not to impose a supplementary income tax upon the corporation as held by the majority of this Court, but rather has construed the law as a tax upon the stockholder. Recognizing the rule that Federal Courts are bound by the construction given a state law by the state courts, the Circuit Court of Appeals reversed Judge Duffy's decision. Judge Minton, who wrote the decision for the Circuit Court of Appeals for the Seventh Circuit, specifically recognized, however, that the reasoning of the *Penney* case as decided by this Court, supported Judge Duffy's decision when he stated:

"At the time this case was decided by the district court, the Supreme Court of Wisconsin had not decided the case of *Wisconsin Gas & Electric Co. v. Wisconsin Tax Department*, supra, and *Blie d v. Wisconsin Foundry & Machine Co.* supra. The trial court relied on the case of *State of Wisconsin v. J. C. Penney Co.* (311 U. S. 435, 61 Sup. Ct. 246, 85 L. Ed. 267.) *The reasoning of that case would seem to sustain the district court's position.*" (Italics ours.)

The Tax Court of the United States came to a diametrically opposite conclusion than that reached by the Circuit Court of Appeals for the Seventh Circuit in the *Wisconsin Gas & Electric Company* case. The Tax Court of the United States in the case of *Montreal Mining Company v. Commissioner of Internal Revenue* (Docket No. 106876, not yet officially reported) on September 16, 1943, squarely decided that a corporation had the right to deduct the Wisconsin privilege dividend tax from its gross income for the purpose of determining net income for income tax purposes under the federal income tax law, and held among other things as follows:

"The Supreme Court, in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, considered the Wisconsin privilege

dividend tax in connection with a constitutional question. In discussing the statute imposing such tax the Court said:

* * * The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out.

Thus, it is apparent that the tax in question was there determined to be a levy on corporate income. Upon the authority of that decision, we hold in petitioner's favor on this issue. The tax is deductible under section 23.(c) of the Revenue Acts of 1934 and 1936."

Thus, it will be observed that as a result of this Court's decision in the *Penney* case in which this Court in the majority opinion undertook to construe the law (which is contrary to the construction given the law by the Wisconsin Supreme Court), a conflict of decisions has resulted in the Federal Courts as a result thereof, and makes the question involved in this appeal even more substantial.

Furthermore, it is perfectly apparent that under the proper final construction given to this law by the Supreme Court of the State of Wisconsin as a transaction tax upon the stockholder, not the corporation, that the whole basis for this Court's decision in the *Penney* case is now removed. The majority decision of this Court in the *Penney* case made no attempt to overrule the case of *Connecticut General Insurance Company v. Johnson*, 303 U. S. 77, 58 Sup. Ct. 77. It was distinguished because of the construction placed upon the law as a supplementary income tax. The limits of a state's jurisdiction to tax, as reflected in

that case, is *a fortiori* applicable to the instant case under the construction of the law as now finally determined by the Wisconsin Supreme Court.

Thus, we submit that under the construction of the law by which this Court is now bound by settled authority, a substantial federal question clearly exists as to whether Wisconsin has jurisdiction to impose a tax on the transactions involved in this record:

Connecticut General Insurance Co. v. Johnson, 303

U. S. 77, 58 Sup. Ct. 436;

Provident Savings Life Assurance Society v. Kentucky, 239 U. S. 103, 111, 113;

St. Louis Compress Co. v. Arkansas, 260 U. S. 346, 348, 349;

Louisville Etc. Ferry Co. v. Kentucky, 188 U. S. 385, 396;

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202;

State Tax on Foreign Held Bonds, 15 Wall. 300, 319.

(2) *A substantial federal question is involved in the right of the State of Wisconsin to impose a tax upon alleged Wisconsin earnings allegedly in surplus regardless of the date of such earnings.*

Under the formula on which the tax in question was assessed, the alleged Wisconsin earnings in surplus from the date that the corporation first did business in Wisconsin to the date of the analysis (December 31st of the year preceding the declaration of the dividend) were included as part of the alleged Wisconsin earnings taxed. The result of the application of such a formula is to tax Wisconsin earnings which were earned many years prior to the enactment and passage of the privilege dividend tax law. It was contended throughout these proceedings that in any event that to the extent that earnings prior

to the enactment of the law were taxed that such law and tax was vulnerably retroactive and as such took the property of the appellant and its stockholders without due process of law and in contravention to the Fourteenth Amendment to the Constitution of the United States. The Wisconsin Supreme Court was evenly divided on this constitutional question, Mr. Justice Wickhem, Chief Justice Rosenberry, and Mr. Justice Martin being of the opinion that to the extent that the tax was attempted to be imposed upon Wisconsin earnings earned more than one year prior to the enactment of the law, that to that extent the law was unconstitutional under the Fourteenth Amendment of the Constitution of the United States. The contention of these three judges is concisely stated in the opinion of Mr. Justice Wickhem in the companion case of *International Harvester Company v. Department of Taxation*, 243 Wis. 198 at Page 208, wherein it is said:

“Mr. Chief Justice ROSENBERY, Mr. Justice MARTIN, and the writer are of the view, (1) that since the United States supreme court has held that the label placed upon this law by the legislature or by this court is wholly ineffective to impair its constitutionality as against the contention that Wisconsin is without power to levy the tax, such label or designation or the selection by Wisconsin of the payment and receipt of the dividend as the occasion for the tax is equally ineffective to save it from objections to its retroactivity; (2) that the earnings of the corporation in Wisconsin upon which are grounded Wisconsin's power to levy the dividend tax must be within reach of a retroactive tax; (3) that the extent of permissible retroactivity should be determined upon the analogy of the income tax cases; (4) that retroactivity should only be permitted to “recent” transactions; (5) that consistently with these principles the tax may not be applied to earnings in Wisconsin which accrued prior to the last corporate fiscal year preceding the enactment of Wisconsin privi-

lege dividend tax; (6) that by reason of the severability clause, the operation of the tax should be so limited; (7) that nothing in the decision upon remand requires a different conclusion."

Under any evaluation of the majority decision by this Court in the *Penney* case the only conceivable ground on which it was determined that Wisconsin had jurisdiction to tax was on the ground that Wisconsin gave protection to the earning of the income used in the payment of the dividend. This protection could be given only in the year in which the income was earned and clearly was not given in the year in which the dividend was paid. Accordingly, there would seem to be no question but what even if there is jurisdictional justification for this tax, and the majority decision in the original *Penney* case was adhered to, that to the extent that the law attempts to impose the tax on Wisconsin income in surplus *regardless of when earned*, and particularly to income earned many years prior to the enactment of the law, it is unconstitutional as taking the property of the appellant and its stockholders without due process of law and in contravention to the Fourteenth Amendment to the Constitution of the United States. That a substantial federal question exists in this respect is evidenced from the following cases:

Nichols v. Coolidge, 274 U. S. 531, 542, 543;

Welch v. Henry, 305 U. S. 134, 59 Supp. Ct. 121, 83 L. ed. 87;

Blodgett v. Holden, 275 U. S. 142, 147;

Coolidge v. Long, 282 U. S. 582, 595, 596;

Untermeyer v. Anderson, 276 U. S. 440, 445.

(g) Stage of Proceedings and Manner In Which the Federal Questions Were Raised.

The Federal questions on which assignment of error has been made have been raised in each step of this litigation before the appropriate bodies.

On the Federal constitutional question of jurisdiction to tax, the appellant raised the question of the validity of the law and purported tax in its claim for abatement filed with the Wisconsin Department of Taxation. The question was again raised in the petitions to review before the Wisconsin Board of Tax Appeals in the various assessments. This same Federal Constitutional question was again specifically raised in the notice to appeal to the Circuit Court for Dane County from the decision of the Wisconsin Department of Tax Appeals (R. 199, 208-212). This same Federal Constitutional question was further raised in the Supreme Court of the State of Wisconsin in the briefs filed with that Court, which is the only method under Wisconsin practice where such questions can be raised (Appellant's brief, pages 2, 14).

So, also was the Federal Constitutional question of retroactivity raised throughout all stages of these proceedings in the same manner and before the same tribunals, as was the question of jurisdiction to tax (R. 201, 212-213, and Appellant's Supreme Court Brief at pages 2 and 50) (R. 221).

(h) Manner In Which Questions Involved Were Passed On By the Court.

The application for abatement filed with the Department of Taxation raising these federal questions was denied. The decision and order of the Wisconsin Board of Tax Appeals further denied relief on these constitutional questions. The Circuit Court for Dane County specifically

passed upon the constitutional questions so raised, but denied relief to the taxpayer.

The Supreme Court of the State of Wisconsin further specifically passed on the Federal Constitutional questions on which error has been assigned and denied relief to the appellant. On the constitutionality of the retroactivity phase of the case, the Supreme Court of the State of Wisconsin was evenly divided, but because the trial court had held the law to be constitutional, the decision was affirmed.

(i) Excerpts From the Record Bringing Case Within the Statute Conferring Jurisdiction in the Supreme Court.

There is no question but what in these proceedings the Federal Constitutional questions on which error has been assigned were drawn in question on the ground that the law and tax was repugnant to the Constitution of the United States and the decision of the State Courts were in favor of the validity of such statute and tax. Typical of the method in which these matters were raised in the record are the following excerpts in the appeal proceedings before the Circuit Court for Dane County as follows:

“(1) That by reason of the facts above stated the transaction upon which the privilege dividend tax is attempted to be imposed in respect to the Minnesota Mining and Manufacturing Company are wholly outside the jurisdiction of the State of Wisconsin, with the exception of the transfer of the dividends by the Company to certain of its stockholders residing in Wisconsin, in which case the transaction takes place partly within and partly without the jurisdiction of said State. To the extent that the privilege dividend tax is attempted to be imposed on transactions wholly outside of the jurisdiction of the State, it is unconstitutional and void and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the state, under

Article I, Sections 1 and 9 of the Wisconsin Constitution and under the Fourteenth Amendment of the Constitution of the United States.

(2) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders residing outside the State of Wisconsin, under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of their liberty and/or property without due process of law, because it imposes upon such non-resident stockholders what is in effect a tax upon the income of such stockholders, although such income is not earned within the State of Wisconsin nor derived from property or business conducted within the State of Wisconsin, and in that it imposed upon the Minnesota Mining and Manufacturing Company a duty of paying and withholding from said stockholders an unconstitutional tax which requires the expenditure of time and money on the part of the Company to compute, pay and withhold the tax.

Although the privilege dividend tax makes the stockholder ultimately liable for the tax, the Company, nevertheless, has legal standing to object to the validity of the law for the reason that, if the aforesaid privilege dividend tax law is unconstitutional, the Company is being subjected to an unconstitutional burden, and further because in practice it is impossible to withhold the exact amount of the tax from each stockholder, and it therefore becomes necessary for the Company to pay a part of the tax out of its general funds.

(3) That the aforesaid privilege dividend tax law is unconstitutional and void, and in violation of the rights of the Minnesota Mining and Manufacturing Company and of its stockholders under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin and the Fourteenth Amendment of the Constitution of the United States, in that it deprives them of property without due process of law by imposing a tax upon the privilege of receiving and paying out dividends,

which privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted by the State of Delaware and exercised pursuant to the laws of said state.

(4) That the aforesaid privilege dividend tax law is unconstitutional and void insofar as it imposes a tax upon dividends which are paid by the Company to stockholders residing outside Wisconsin, because it is in effect a tax upon stock held by such stockholders, or upon the dividend which is a debt of the Company when declared, which are outside the jurisdiction of the State; and such tax, therefore, deprives the Minnesota Mining and Manufacturing Company and its stockholders residing outside the State of Wisconsin of liberty and/or property without due process of law, in violation of the provisions of the Constitution of the State of Wisconsin" (R. 208-210).

• • • • •

"(11) That in the modified assessments as confirmed by the Board of Tax Appeals in computing the alleged portion of Wisconsin income in surplus the taxing authorities use as a numerator the total alleged Wisconsin income in surplus over total alleged surplus as a denominator, rather than alleged Wisconsin earnings for any particular year over total surplus. Such a formula is neither contemplated by the act nor is it constitutionally valid. As a result of the use of this formula an attempt is made to levy a tax upon dividends allegedly paid out of earnings derived many years prior to the effective date of the privilege dividend tax law, and the effect of such a formula renders the law as applied unconstitutional under the Fourteenth Amendment of the Constitution of the United States and under Article I, Sections 1 and 9 of the Constitution of the State of Wisconsin, and further void under Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States" (R. 212-213).

The Federal questions were also raised in the brief of the appellant filed in the Supreme Court of the State of Wisconsin as follows:

"1. Is the Wisconsin Privilege Dividend Tax Law, as applied by the Wisconsin Department of Taxation in making the additional assessments in question against a foreign corporation on the so-called "surplus analysis" theory, constitutional under the due process and contract clauses of the Wisconsin Constitution and the Federal Constitution, and under Article VIII, Section 1 of Wisconsin Constitution?

The Court below held the law as applied constitutional." (Appellant's brief, R. 221.)

The questions were further raised in appellant's brief at Page 14 of appellant under heading as follows:

"The Wisconsin privilege dividend tax as applied by the Department of Taxation in making the assessment in question is unconstitutional under both the State and Federal Constitution. (Article I, Sections 1 and 9, and Article VIII, Section 1, of State Constitution and 14th Amendment to Constitution of United States.)" (R. 221.)

The questions were further raised in appellant's brief at Page 50:

"If any tax can validly be assessed, the tax in the instant case was improperly computed; if the law is construed to permit assessment as made, it is vulnerably retroactive and unconstitutional under the due process clauses of both State and Federal Constitutions" (R. 221).

(j) Copy of Opinions on Renditions of Judgment.

There are attached hereto the following copies of opinions and marked with the respective exhibit as reflected herein:

(1) Copy of opinion of the Wisconsin Board of Tax Appeals in this matter—Exhibit "A".

(2) Copy of opinion of Circuit Court for Dane County in instant case—Exhibit "B".

(3) Copy of opinion of Circuit Court for Dane County in companion case of *International Harvester Company v. Department of Taxation* adopted by way of reference in support of decision in instant case—Exhibit "C".

(4) Copy of decision of Supreme Court of Wisconsin in instant case, 243 Wis. 211, 10 N. W. (2d) 174—Exhibit "D".

(5) Copy of decision of Supreme Court of Wisconsin for rehearing in instant case (11 N. W. (2d) 96)—Exhibit "E".

(6) Copy of opinion of Supreme Court of Wisconsin in companion case of *International Harvester Company v. Department of Taxation* (243 Wis. 198, 10 N. W. (2d) 168), and adopted by way of reference to decision in instant case—Exhibit "F".

(k) Cases Believed to Sustain Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Connecticut General Insurance Co. v. Johnson, 303 U. S. 77, 58 Sup. Ct. 77;

* (Clerk's Note.—Exhibits "C" and "F" are printed as Appendices to the Jurisdictional Statement in No. 620, October Term, 1943, and are not reprinted here.)

Hans Rees' Sons v. North Carolina, 283 U. S. 123;
J. D. Adams Manufacturing Co. v. Storen, 304 U. S.
307, 58 Sup. Ct. 913;
Hoeper v. Tax Commissioner, 284 U. S. 206;
Ficher's Blend Station v. Tax Commissioner, 297
U. S. 650.

Respectfully submitted,

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EXHIBIT "A".**COPY OF DECISION OF WISCONSIN BOARD OF TAX
APPEALS RENDERED ON FEBRUARY 13, 1942****WISCONSIN BOARD OF TAX APPEALS****MINNESOTA MINING AND MANUFACTURING COMPANY, a Dela-
ware Corporation, *Petitioner,*****vs.****WISCONSIN DEPARTMENT OF TAXATION, *Respondent*****Decision and Order****Docket No. D-43, Docket No. D-614, Docket No. D-624.**

Three cases, all involving assessments of Wisconsin privilege dividend taxes, are here consolidated for the purpose of determination. They are appeals from the assessment of such taxes by the Wisconsin Tax Commission and its successor, the respondent, for the years 1936 to 1940, inclusive, and from the denial by the respondent of petitioner's application for abatement thereof in each case. These appeals pertain to taxes alleged to be due on dividends paid as follows: D-624 in the year 1936; D-43 in the year 1937; and D-614 in the years 1938, 1939, and 1940.

We make the following findings of fact: The petitioner is a Delaware corporation with its principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. It purchased this factory in 1929 and began manufacturing operations therein in 1930. Sales are made through an office in Chicago, Illinois, but all orders are confirmed at the St. Paul office, and shipping instructions are forwarded from there. Purchasers of products manufactured in Wisconsin remit direct to the St. Paul office and the proceeds are there mingled with funds from sales from other factories and other divisions of petitioner's business. Checks for payrolls are prepared at the St. Paul office and are drawn on a Wausau bank. A deposit equaling the amount of the pay-

roll is forwarded to the Wausau Bank on the same day the checks are forwarded.

The Company reports on a calendar year basis, taking an inventory and closing its books as of December 31 of each year. The Company maintains but one general surplus account and none of the earnings derived by it from property located in or business transacted in Wisconsin are segregated in any way. The petitioner does not maintain a separate balance sheet for Wisconsin operations, nor is there a separate surplus account for this state.

All dividends during the years in question were declared by the Board of Directors of the Company at meetings held in St. Paul. The First Trust Company of St. Paul is the transfer agent for the petitioner. All of the dividends paid by the petitioner during the period here under review were paid to the transfer agent in St. Paul, by a check drawn on a St. Paul bank and distributed to the Company's stockholders by the transfer agent. Dividends were paid from surplus, pursuant to the laws of Delaware, and not from current earnings.

The petitioner challenges the validity of the assessments made for the several years here involved and contends:

First, that the Wisconsin privilege dividend tax law is unconstitutional; Second, that the respondent's method of computing the tax is invalid; Third, that the assessments, if found to be valid, should not be subject to penalties and interest.

The Wisconsin statutes here involved are Section 71.60, Section 3 (1), (2), and (4):

"(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to three per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of section 17.05 of the statutes, after the passage and publication of this act and prior to July 1, 1941. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

In our opinion the following decisions clearly hold that the Wisconsin privilege dividend tax law is constitutional: *State ex rel. Froedtert Grain and Malting Company vs. Wisconsin Tax Commission*, 221 Wis. 225; *Minnesota Mining and Manufacturing Company vs. Wisconsin Tax Commission*, 298 N. W. 186; *J. C. Penney Company vs. Wisconsin Department of Taxation, et al.*, 311 U. S. 435.

We find that the respondent's computations of privilege dividend taxes due from the petitioner were proper and valid and complied with that statute as construed by the Wisconsin Supreme Court in *Minnesota Mining and Manufacturing Company, supra*. *Appeal of International Harvester Company*, WBTA (decided February 13, 1942).

The privilege dividend tax law requires every corporation liable under the law to make a return thereof and pay the tax to the respondent on or before the last day of the month following the payment of dividends. There is no statutory provision for the waiver of interest and penalties, and in our opinion the amounts due from the petitioner during the years in question as recomputed by the respondent are subject to the interest and penalties prescribed by law. *Laabs vs. Tax Commission*, 218 Wis. 414.

We find the correct assessment for the several periods here involved to be:

D-624, 1936	\$2,220.66
D-43, 1937	3,037.75
D-614, 1938, 1939, 1940	9,307.08

To the above amounts interest and penalties are to be added as provided by law.

It is Ordered:

That the additional assessments appealed from be and the same are hereby modified to conform to the findings announced herein, and as so modified, the assessments are hereby affirmed.

Dated at the State Capitol, Madison, Wisconsin, this 13th day of February, 1942.

WISCONSIN BOARD OF TAX APPEALS
G. L. BROADFOOT,
Chairman,
W. J. CONWAY,
HARRY SLATER.

EXHIBIT "B".

COPY OF DECISION OF CIRCUIT COURT FOR DANE COUNTY, HONORABLE ALVIN C. REIS PRESIDING, IN INSTANT CASE UNDER DATE OF AUGUST 14, 1942.

By the Court

This is a dividend tax case, companion to International Harvester Company *vs.* Wisconsin Department of Taxation, decided this date.

Appellant herein raises a further issue. One of its officers testified before the Board of Tax Appeals, there were "no dividends declared out of profits earned in Wisconsin because the earnings were all used to expand the business in Wisconsin."

The appellant's position is expressed at pp. 26-27 of its brief, referring to Exhibit 15 before the tax body: "This exhibit and the testimony with respect thereto, we submit, conclusively proves that all Wisconsin earnings, plus additional advances from St. Paul, come back to Wisconsin operations and are represented primarily in capital investments in the form of physical assets. As such obviously these Wisconsin earnings were not and could not be available for the purpose of paying dividends. * * * Exhibit 15 reflects conclusively that in each year since the appellant has been in Wisconsin to and including 1940, the total advancements from St. Paul at all times has substantially exceeded the amount repaid to the home office in St. Paul out of Wisconsin income. In short, Wisconsin income has never been used for the purpose of paying dividends."

We do not believe that the company's argument is logical. The fact that the company increased its capital investment in Wisconsin, does not destroy the further fact that its Wisconsin income went into the common surplus and increased generally the corporation's dividend potentialities to the extent of that contribution. If it had lost money in Wisconsin, there is nothing to indicate that its capital assets in the state would have been affected. Therefore, the

profit realized in Wisconsin places the aggregate corporate surplus just that much ahead.

Upon all other issues, the reasoning and factual background set out in our opinion in the International Harvester case this date are applicable, *mutatis mutandis*, to the situation of Minnesota Mining and Manufacturing Company.

We, of course, can not waive statutory penalties and interest, as the present appellant requests.

The attorney general may prepare and submit to appellant's attorneys the order and judgment affirming the decision and order of the Board of Tax Appeals.

EXHIBIT "C".

COPY OF OPINION IN CASE OF MINNESOTA MINING & MANUFACTURING COMPANY VS. DEPARTMENT OF TAXATION, 243 WIS. 211, 10 N. W. (2D) 174. MARCH 10—JUNE 16, 1943.

WICKHEM, J.:

The facts in this case are not in substantial dispute. Appellant is a Delaware corporation, with its principal office and place of business in St. Paul, Minnesota. It operates a factory at Wausau, Wisconsin, manufacturing roofing granules. This factory began manufacturing operations in 1930. Sales are made through an office in Chicago but orders are confirmed at the St. Paul office. When products so manufactured are sold, the remittances are made directly to the home office at St. Paul, and the funds from such sales are deposited in the general account of the appellant. Pay rolls, together with pay checks, are prepared at the St. Paul office and drawn on a Wausau bank, and a deposit equaling the amount of the pay roll is forwarded to the Wausau bank to cover the checks at approximately the same time that the checks representing the pay roll are forwarded. The company reports upon a calendar-year basis, closing books as of December 31st, each year. It maintains

one general surplus account and none of the earnings from property located or business transacted in Wisconsin are segregated in any way. It maintains no separate balance sheet for Wisconsin operations. Dividends are declared by the board of directors of the company at meetings held in St. Paul; the First Trust Company of that city being the company's transfer agent. All dividends are paid to this transfer agent by check drawn upon a St. Paul bank and distributed to the stockholders by the transfer agent. Dividends are paid from surplus.

Sec. 34, Delaware Corporation Law, empowers corporations to declare and pay dividends either out of net assets in excess of its capital, or out of net profits for the fiscal year then current "and/or" the preceding fiscal year.

In making the assessments the department of taxation analyzed the surplus on December 31st of the year preceding that in which a particular dividend was paid. In this analysis, the department went back to the date on which the corporation commenced doing business in Wisconsin for the purpose of determining, (1) total surplus existing at that time; (2) the ratable contribution of earnings in Wisconsin to the surplus as of December 31st, prior to the declaration of the dividends. The department selected the close of the year preceding the payment of the dividend as the basis of its computations rather than the surplus at the time of the payment or receiving of the dividend, it being the view of the department that unless the corporation had closed its books and taken inventory at the time of the payment of the dividend (in which case analysis would have been made as of that time) it would be impossible to revise the surplus as of each dividend-paying date. The dividends were paid out of the corporation's general account. There never was any attempt made to earmark any of the earnings coming from Wisconsin or other states, although the corporation did business in all of the other states of the Union.

Such contentions by appellant as question the constitutionality of the privilege dividend tax as applied by the Department of Taxation are sufficiently answered by the opinion in *International H. Co. v. Department of Taxation*, ante, p. 198, 9 N. W. (2d) —. We proceed, therefore, to deal with contentions peculiarly applicable to this case.

Appellant contends that the department has not analyzed the surplus of appellant as of the date of the payment of the dividend. The record shows that dividends were paid on December 7, 1936, December 10, 1937, December 12, 1938, December 21, 1939, and December 10, 1940. The department analyzed appellant's surplus as of December 31, 1935, 1936, 1937, 1938, and 1939, respectively, for the reason that the corporation closed its books and took inventory as of those dates. We see no objection to this method. It is the same basis upon which the dividend was declared, namely, the ascertained surplus of the corporation available for dividends. We are not persuaded that there is anything jurisdictionally or procedurally lacking in a method of computation which follows the ordinary course of business adopted by the corporation itself in voting its dividend. Aside from this, there is a strong inference that dividends are paid out of assets ascertained to be available for this purpose. The normal corporate procedure is to use the last annual inventory and closing of the books to furnish the information, and the dividend is customarily based on the situation thus disclosed. If some accurate method is in use in a particular case to disclose the general corporate situation as of the time of the dividend, it is for the corporation to show this, and if satisfactorily shown, it is proper for the department to use this as a basis for the tax.

It is next contended that no Wisconsin income was used in the payment of dividends, because the record demonstrates that all Wisconsin income was reinvested in physical assets of the corporation in Wisconsin. This contention misses the point. It seems to us that it can make no possible difference what is done with the particular money earned in Wisconsin so long as the earnings go to swell the total assets of the corporation. To the extent that they do this, and increase the margin of assets over liabilities, including capital, they are a proportional part of the funds available for dividends. None of the Wisconsin earnings are earmarked. According to the record, they are turned in to the home office, and reinvested in physical assets located in Wisconsin. This does not repel the inference that Wisconsin net earnings are a part of the funds out of which dividends are declared and paid.

It is finally contended that even if the assessments are held valid or partially valid, penalties and interest should not be imposed. We find the statutory requirements entirely clear and unambiguous upon this point, and there is no attack upon the validity of the provisions. Hence, we can only paraphrase what was said by this court in *State v. Baker*, 232 Wis. 383, 396, 286 N. W. 535, 287 N. W. 690, that despite the urge to find a way to avoid the imposition of penalties, "We are bound by the clear unambiguous language of the statute and cannot by judicial construction introduce into them provisions and remedies which do not exist." See in this connection *Laabs v. Tax Comm.*, 201 Wis. 414, 261 N. W. 404; *State ex rel Crucible S. C. Co. v. Tax Comm.*, 185 Wis. 525, 201 Wis. 764.

By the Court.—Order and judgment affirmed.
BARLOW, J., took no part.

EXHIBIT "D"

IN SUPREME COURT, STATE OF WISCONSIN

August, 1943 Term

January, 1943 Calendar

No. 57

11 N. W. (2d) 96

MINNESOTA MINING & MANUFACTURING COMPANY, *Appellant*

WISCONSIN DEPARTMENT OF TAXATION, *Respondent*.

WICKHEM, J. on re-hearing:

The court has thoroughly considered the motions for re-hearing filed herein and is not disposed to modify its views or to restate or amplify its opinion in any respect but one. In discussing the permissible retroactivity of the privilege dividend tax and noting an equal division of the

court upon that point, the opinion did not indicate whether the difference in view was based upon the constitution of the state of Wisconsin, the constitution of the United States of America, or both. It may be useful to state that the constitutionality of the law in this respect was considered under both; and the court was of the view that the same considerations governed whichever constitution was applied.

By the Court:—Motion for rehearing is denied, with \$25 costs.

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